IN THE

Supreme Court of the United States

October Term, 1954

No. 308

WALTER BITTERLING, *Petitioner,*

v.

MAPLE ISLAND FARM, INC., *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY OF PETITIONER

Respondent has filed a 54-page opposition brief, which includes a 45-page highly argumentative "Appendix." This "Appendix" is simply respondent's version of its own case based on Hadrath's testimony, which, while uncritically adopted by the court below, was neither believed nor accepted by the trial judge who had the opportunity to observe his conduct and demeanor over a period of many days. The trial court, of course, had before it other evidence on credibility than that offered by respondent, and, weighing all the evidence, found the preponderance favored petitioner. Respondent's strategy is to use its lengthy and distorted version of the facts, as set forth in

the "Appendix," to make this case appear as one involving fact detail only and thus inappropriate for this Court's review.[1]

Respondent declines to see petitioner's "Questions Presented" as meeting the standards for review simply because the various grounds urged by the petitioner for the granting of the petition were not stated in the precise text of Rule 19(b) of this Court. We have never understood that the trite repetition of the entire language of the rule relied on was either necessary or desirable.[2]

But the petition amply sets forth the several grounds which this Court advises in Rule 19(b) constitute grounds for review. The basic federal question presented, of course, is whether the court below went beyond the proper and lawful scope of appellate judicial review under Rule 52, Federal Rules of Civil Procedure, in reversing trial court findings which rested on the respective credibility of the two key witnesses, Hadrath and petitioner.[3]

The decision below, as pointed out in our petition at pages 17 *et seq.*, conflicts with decisions of the Court of Appeals for the Second Circuit in *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 433, and the Court of Appeals for the Third Circuit in *Smith* v. *McLane*, 174 F. 2d 819, 821.[4] The decision below is also in conflict with the concept of the scope of appellate review stated clearly by this Court in *United States* v. *Oregon*

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[1] The manifold misstatements of respondent's "Appendix" would require an equivalent space—perhaps 50 pages—to correct. Since we do not believe even the respondent's version of the facts, distorted as it is, can affect the granting of the petition, we will not attempt here to point out the inaccuracies.

[2] Petition's Conclusion, p. 38, states the essence of Rule 19(b).

[3] We have never understood that a petition for a writ of certiorari, even under Rule 19(b), constituted a challenge to the integrity of the court below. What we urge is that the court below erred grievously.

[4] See also court of appeals' cases cited in Note 25, Petition, p. 18.

State Medical Society, 343 U.S. 326, *United States* v. *United Shoe Mach. Co.,* 247 U.S. 32, 41, and *Adamson* v. *Gilliland,* 242 U.S. 350, 353. (See Petition, pp. 19, 20.)

If the reasoning of this Court in these cases is not controlling on the scope and limits of appellate review under the Federal Rules of Civil Procedure, then this Court should review the question and authoritatively define the scope of review under Rule 52 *as applied to the credibility of witnesses. McAllister* v. *United States* (No. 23, Oct. Term, 1954, decided Nov. 8, 1954) involved the application of Rule 52 with respect to the *weight* of the evidence; no problem of *credibility* was involved, whereas here the court below has reversed findings resting on credibility without acknowledging any distinction between review of credibility findings as distinguished from those resting on the mere weight of the evidence.

Notwithstanding the trial court's clear statement that "elaborate arguments" were made on the respective credibility of Hadrath and petitioner, respondent urges now that the court did not pass on credibility as to some issues. The "Appendix" argues that the trial court, after indicating it was unnecessary to decide whether the parties made a binding agreement for so long as respondent did business in Venezuela, then proceeded to do so. Like many parts taken out of the whole, the very isolation of the trial court's statement distorts it. Respondent failed to point out that while resolving this issue with *a conclusion of law* would have been necessary to find an *express* contract, it was unnecessary *to an award on quantum meruit.* The opinion states:

> "The plaintiff is entitled to recover on the contracts alleged in his Complaint for the sale of powdered milk for the defendant in Mexico and Venezuela, or on quantum meruit for the reasonable value of his services rendered at the special instance and request of the defendant. * * * The issues may be more easily and accurately solved under quantum meruit than on

> the contract, and with more justice and equity to the parties concerned." (Pet. Appen., pp. 18, 19).

In other words, while *believing* petitioner's testimony that Hadrath had so agreed, the trial court was faced with various problems, including the difficulty of assessing future damages if its award was based on express contract. Hence the trial judge decided not to "borrow trouble," as he put it, by putting the award on the express contract. What is important is that the finding that an agreement was made showed the trial court believed and relied on petitioner's testimony on this score and disbelieved Hadrath.

That this case depended upon the credibility of two sharply conflicting witnesses has never previously been seriously challenged, although respondent apparently believes that the exigencies of the case now require it to reverse the position which it asserted so aggressively in the trial court. There respondent's case revolved entirely around an attack on petitioner's credibility; if Hadrath was telling the truth, petitioner had no case; if petitioner was telling the truth, he was entitled to recover. The exposure of the sordid part Hadrath played in what became the St. Croix Trading Company deal exploded any pretense of just cause for petitioner's discharge, for as the trial court noted, the full story of this "dummy" company and its secret partners "reveals the mental attitude and explains the conduct of some of the parties involved in this controversy."

Respondent's feeble apologies for the St. Croix Trading Company,[5] demonstrate why neither Hadrath nor any other witness tried to explain it to the trial court. But the vice is not in the *existence* of St. Croix but in what it was used for. Even now, respondent does not really try to explain that there was any legitimate purpose, for it had

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[5] Up to now respondent has always tried to ignore St. Croix Trading Company, saying only that it was "immaterial."

no purpose except as a vehicle to exploit petitioner's discharge[6] and siphon off the commissions earned by petitioner *before his discharge* on milk delivered in 1949, as the trial court found. To refer to these facts is not to argue the merits but to demonstrate the ramifications of the devious schemes of respondent and Hadrath, their standards of ethics, and the lengths to which they were willing to go to defraud and "dispose" of petitioner, all of which properly went into the trial court's total evaluation of Hadrath as a witness. As we pointed out in the petition, none of this was even touched upon by the court below. Like the case of the vital Exhibit L, the court below can only be assumed to have missed the entire significance of St. Croix and its plain impact on the reliability of the witness on whom respondent's whole case rests.[7] (See Petition, p. 24 and especially note 28)

Respondent, having failed to convince the trial judge, who saw and heard these two key witnesses testify for a total of 20 of the 27 trial days, did succeed in convincing the court below that Hadrath, branded by the trial court as having testified falsely under oath, did in fact tell the truth, although they never saw him or observed his conduct and demeanor as a witness.[8] In the present posture

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[6] The distorted effort to justify petitioner's discharge should evaporate in the light of the St. Croix scheme and the appropriation of petitioner's commissions on 1949 Venezuelan deliveries by Hadrath, Toro, and Stone, who had so much to gain by "disposing" of petitioner. They, of course, received and retained this $50,000.00 "windfall" without so much as one hour of honest effort.

[7] In this Court, of course, the fact that St. Croix was used by Hadrath as an instrument for defrauding petitioner is not of itself material. At this point, it is relevant only as it bears on credibility and the related factor of the motives for discharging petitioner and for determining whether the court below invaded trial court functions in trying to pass on the credibility of "witnesses unseen."

[8] Had the trial court resolved the issue of credibility *against* petitioner, the court of appeals would have had no proper basis for reversing on credibility, and, on affirmance, there would have been no basis for review by this Court.

of the case, respondent, with a bland inconsistency, urges that credibility never was, and is not now, the controlling and pivotal question in the case. Pursuing this "about face," respondent's opposition brief boldly asserts (at p. 7):

> "The case does not on any point rest upon the relative credibility of these two witnesses." [*i.e.*, Hadrath and petitioner.]

But, apparently forgetting this position, respondent, four pages later in the "Appendix," states:

> ". . . The [Mexico] claim is based on an alleged *oral agreement* testified to by petitioner as having been made between himself and Reuben N. Hadrath, respondent's general manager, *while on an airplane en route to Mexico City November 24, 1945.*" (Opp. Brief, p. 11.) [Italics supplied.]

Since it is admitted that Hadrath and petitioner were the only persons present at the time, plainly the existence or nonexistence of an agreement, or occurrence of conversations concerning it, *both of which Hadrath denied*, must of necessity rest on the veracity and credibility of these two witnesses.

Respondent's self-contradiction is repeated with respect to the making of the Venezuelan agreement. At pages 17, 18, respondent's opposition brief states:

> "(a) Petitioner's claim as to the duration of respondent's obligation to pay commissions *rests solely upon the oral testimony of petitioner* . . . [Italics supplied.] (p. 17).

> "(c) Plaintiff's claim as to the duration of the commission payments [for the Venezuelan agreement] was positively denied by Hadrath, *the person with whom petitioner claims the agreement was made.*" [Italics supplied.] (p. 18).

Just how respondent "squares" these mutually exclusive and conflicting positions is not explained. What is quoted

above from pages 11, 17, 18, of the opposition brief is fully in accord with the evidence and the findings, thus making the statement quoted from page 7 of the opposition brief necessarily incorrect.

If there is any doubt whether respondent has completely turned an "about face" from its hotly argued position on credibility before the trial court, that question is settled by the trial court's opinion, which states:

> "Elaborate arguments pertaining to the veracity of the plaintiff and Hadrath have been made in the briefs of counsel. Counsel for defendant say 'It (Plaintiff's testimony) is characterized throughout by untruths, contradictions, and incredibilities." (Pet. Appen., p. 17.)

The trial court flatly rejected respondent's contention as to petitioner's credibility, saying:

> "Mistakes, errors and variances as to detail may be expected in the protracted search and may be found in plaintiff's innumerable answers. For the most part they relate to unimportant and collateral matters. Whether the plaintiff attended a baseball game on a certain date, whether he came to the United States in September or in October, whether a particular conference was on Monday or Thursday of the week . . . has little probative value . . ." (Pet. Appen., p. 17.)

The experienced trial judge doubtless weighed many factors in arriving at his conclusion as to which of these two key witnesses was telling the truth on the important issues. For 20 days he had watched these two men; the crucial values in the appraisal of human testimony which are not fully preserved in a printed record were in his mind, "the furtive glance, . . . the candor or lack of it, . . . the carriage and mien. The brazen face of the liar, the glibness of the schooled witness . . . the honest face of the truthful one . . ." Here certainly is a case which fits into the classic pattern on this subject so aptly described in *Creamer* v. *Bivert,* 214 Mo. 473, 479, where the court said:

> "* * * In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, *nisi*, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. * * *"

After this careful analysis (discussed more fully at pages 20-33, Petition), the trial court took pains to point out factors which characterized the "business methods of Hadrath," his failure, although trained as a lawyer, to reduce agreements to writing and his conduct in setting up St. Croix Trading with Toro and Stone as secret and illegal participants, suggesting that these factors revealed something of the "mental attitude" of Hadrath and his associates. The trial court took even more pains in making explicit findings on Hadrath's unreliability, specifically that he had knowingly given false testimony.

As part of the effort to show that the credibility of Hadrath and petitioner was not controlling, respondent points out that fourteen witnesses other than the two key witnesses were heard by the Court. If this is to suggest that *the bulk* of the testimony was from these 14 witnesses, that is readily disposed of. We have pointed out that 20 of the 27 trial days were devoted to direct and cross-examination of Hadrath and petitioner. Thus the remaining 14 witnesses absorbed a total of seven days,[9] much of that through interpreters and dealing with audit reports and accounts which furnished the factual basis for assessing damages. *Not one* of these 14 witnesses was in a position or undertook to testify on what agreements were made or

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[9] For example, about three days were used in the testimony of a 29-year old ex-Federal judge of Venezuela who testified that the case was controlled by Venezuelan law—that petitioner was a "piece worker" under Venezuelan labor law, entitled only to nominal terminal leave pay but no damages.

what conversations occurred between Hadrath an and petitioner.

On the petition and the opposition brief alone, this Court would be warranted in concluding that the court below invaded the province and function of the trial court in passing on credibility and that the decision below should be reversed and remanded with directions to affirm the trial court, without further argument or proceedings in this Court.

Respectfully submitted,

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